

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

77-14440

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1440

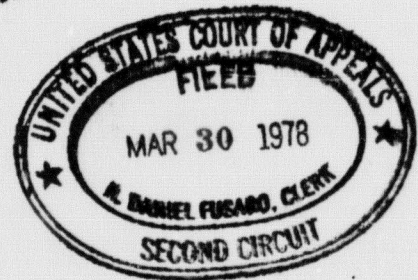
UNITED STATES OF AMERICA,
APPELLEE,

-VS-

VALDEMAR DaSILVA PEREIRA,
APPELLANT.

On Appeal From The United States District Court
For The District Of Connecticut

PETITION FOR REHEARING



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The appellant, Valdemar DaSilva Pereira, petitions for rehearing of his appeal, decided March 16, 1978 (slip op. 2039). The defendant moved to dismiss his indictment for violation of 8 U.S.C. §1326, but the district court ruled that the broad issue raised (invalidity of the deportation order which the defendant allegedly disregarded by reentering the United States) was no defense. This Court affirmed on narrower grounds,^{1/} relying on some of the "facts of this case," p. 2044:^{2/}

1. That the challenged guilty plea occurred 12 years ago;

2. That no direct or collateral attack had been made in state court, and that if such an attack had been made and based on Boykin v. Alabama, 395 U.S. 238 (1969), it would have failed, because Boykin is not retroactive;

3. That the allegations in support of the motion are "insufficient" for appellant "to prevail on the constitutional issue";

4. That appellant did not raise this issue in any of his deportations or in his previous criminal prosecution under §1326;

5. That the government's burden of proving the voluntariness of the appellant's 1965 plea would have been more easily borne in 1970 than "in 1978";

^{1/} "[W]e ... affirm, without deciding whether, under other circumstances, a collateral attack on a deportation order might be permissible in a §1326 proceeding." P. 2045.

^{2/} The broader language of the opinion, pp. 2044-45 n.6, however, seems to suggest that no alien could defend a §1326 prosecution on the ground that the prior deportation was based on an invalid conviction.

6. That if the appellant had raised this issue sooner he might have been subsequently deported on "available alternative grounds," namely entry by an alien who has been previously deported, and if he later reentered, he could have been prosecuted under §1326 with a sounder predicate.

Most of these "facts" involve misapprehensions of the record or of the law, and they do not support the panel's decision. First, the Court's characterization of the basis of appellant's motion is inaccurate. Appellant did not rely exclusively on Boykin, as the opinion would have it, p. 2042.^{3/} Nor did he allege "only" that he "cannot recall" knowing his rights. P. 2044. Rather he requested a hearing, based on a preliminary showing by affidavit of what he and four other witnesses could say, and by offering a transcript of one of the 1965 court sessions. This Court cannot now say that Judge Zampano, after hearing all the testimony, could not as a matter of law have found as a fact that the pleas were involuntary. The affidavits were offered not to win the motion, but in support of a request for a hearing. App. 6. The government treated them as such

^{3/} The motion alleged "that his deportation was unlawful and that the prior conviction upon which the deportation was based is constitutionally invalid." App. 6. Appellant's opening memorandum did refer only to Boykin--while recognizing its nonretroactivity--but a preargument supplemental memorandum, the argument on the motion, App. 9 ("involuntary and unintelligent guilty pleas"), 22 ("the claim of a voluntary waiver of Constitutional rights"), and the brief on appeal, 15-19, all demonstrate that the claim was broader than Boykin's narrow holding of what a state court record must contain. Boykin was hardly the first case to establish that a guilty plea, to be the basis of a valid conviction, must be a knowing and intelligent waiver of constitutional rights. E.g., Von Moltke v. Gillies, 332 U.S. 708, 724 (1948); Kercheval v. United States, 274 U.S. 220, 223 (1927).

also (see Gov't Mem. at 2, 7-8) and joined the request for a hearing if the court were to rule the defense available. It is unfair for this Court now to rule that the preliminary allegation of one paragraph of one of the affidavits would not itself permit appellant to "prevail on the constitutional issue." P. 2044. The issue was not that, but whether the defendant was entitled to a hearing.

That the pleas were entered twelve years ago is likewise no basis to refuse the appellant's claim. He did not lie in wait and choose this moment to bring his challenge, after all the witnesses had died or some such. Rather, the government charged him with a new crime premised entirely on those 1965 pleas. There is no basis in this record to speculate that the government would have had a harder time of it in 1977 (not "1978") than in 1970: all five possible witnesses, including counsel and the judge, were available, as well as a transcript of one of the pleas. Nor is it so unusual for a court to have to look back twelve years and find facts; courts engage in such tasks routinely in civil cases, including habeas corpus actions. Only where there has been deliberate withholding of grounds may a court decline to hear the matter. See Sanders v. United States, 373 U.S. 1, 10-11, 17-18 (1963); cf. McKart v. United States, 395 U.S. 185, 200 (1969) ("foolhardy" to bypass earlier remedies and assert a claim only when facing a risk of prison; few would do so). There has been and can be no claim here that it was to appellant's advantage that his

previous counsel have not helped him challenge his plea.

The "alternative grounds" for appellant's deportation which the Court suggests INS "unquestionably" had "available" if appellant had raised his challenge earlier are also illusory. A deportation under 8 U.S.C. §§1182(a)(17) and 1251(a)(1)(see slip op. at 2044) would have been equally premised on appellant's first deportation and hence equally dependent on his invalid convictions. Thus, such an "alternative" would have formed no sounder a predicate for a §1326 prosecution than do the actual record facts of this case.

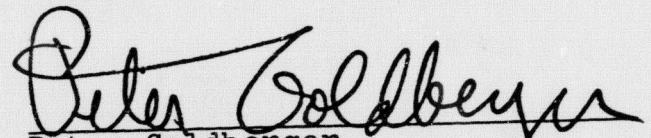
Finally, the Court's devotion of two and a half pages (pp. 2040-41, 2045) of its five and a half page opinion to a detailed elaboration of generally uncontested^{4/} but also generally immaterial "facts," coupled with the remark that in light of this history the panel "do[es] not hesitate to affirm," inevitably gives the impression that the decision might go otherwise if the Court felt differently about the appellant. It was this same response that led Judge Zampano to suggest that he recuse himself. App. 25-26, 30. Appellant respectfully suggests that the issue in this case is whether he was entitled to a hearing in the district court on the factual predicates of his proffered defense. For the reasons stated in his opening and reply briefs, this court should hold that he was entitled to such a hearing.

^{4/} It is not true that appellant's original Connecticut sentence "was not served." P. 2040. Under 8 U.S.C. §1252(h), INS could not deport him, and did not, until he was released from prison after serving more than 19 months in the state penitentiary.

CONCLUSION

The panel decision, resting on grounds not relied on by the government and founded on misapprehensions of law and fact, should be withdrawn, the appeal reheard, and the judgment below reversed.

Respectfully submitted,


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Dated: March 29, 1978

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That two copies of the foregoing Petition for Hearing have been mailed to Hugh W. Cuthbertson, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 29th day of March, 1978.

